STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and GLENN OKIMOTO, Former Comptroller, Department of Accounting and General Services, State of Hawaii; MARY ALICE EVANS, Comptroller, Department of Accounting and General Services, State of Hawaii; DIANNE MATSUURA, Personnel Officer, Department of Accounting and General Services, State of Hawaii; JAMES RICHARDSON, Administrator, Central Services Division, Department of Accounting and General Services, State of Hawaii; and DONALD INOUYE, Manager, Physical Plant Operations and Maintenance Program, Department of Accounting and General Services, State of Hawaii, Respondents.	CASE NO. CE-01-515 (On Remand) DECISION NO. 443A AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On March 13, 2004, the First Circuit Court in Civil No. 03-1-1797-09 (SSM) ordered a remand of an appeal filed from Decision No. 443 by above-named Respondents GLENN OKIMOTO, MARY ALICE EVANS, DIANNE MATSUURA, JAMES RICHARDSON, and DONALD INOUYE (collectively State or Employer). The remand order states in relevant part as follows:

> In Conclusions of Law No. 2, the Board concludes that because "the conduct ran into the limitations period and was akin to a continuing violation where each occurrence represented a new, contestable violation." In Order No. 2, the Board orders Respondents "to negotiate other appropriate remedial and corrective relief to make the affected Unit 01 employees whole." In the Court's view, the Order is vague as

to whether the Board is ordering Respondents to negotiate for violations occurring more than 90 days before the September 23, 2002 Prohibited Practices Complaint, which could raise statute of limitations issues if the Board is treating each occurrence as a "new, contestable violation."

Therefore, it is hereby ordered, adjudged and decreed that this case be remanded to the Hawaii Labor Relations Board for further proceedings to clarify the foregoing issue.

On March 12, 2004 and June 28, 2004, the Board held status conferences on the instant case. The parties were requested to submit supplemental memoranda by July 27, 2004 on the remanded issues. Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a supplemental memorandum of fact and law on July 27, 2004. The State did not submit a written memorandum. The Board heard oral argument on August 6, 2004.

Thereafter, on August 9, 2004, the UPW filed Proposed Findings of Fact, Conclusions of Law, and Order on Remand. On September 10, 2004, Respondents filed a Statement of Objections to UPW's Proposed Findings of Fact, Conclusions of Law, and Order on Remand with the Board.

Based upon a review of the entire record, testimony and argument, the Board makes the following additional Findings of Fact, and hereby amends the Discussion at pp. 23-24, the Conclusions of Law No. 2, and Order No. 2 in Decision No. 443, dated August 4, 2003:

FINDINGS OF FACT

62. From on or about February 2002 to July 2002 RICHARDSON unilaterally implemented a whole school renovation pilot project. The pilot project involved unilateral changes in hours of work and work schedules of bargaining unit 01 employees. RICHARDSON formulated the pilot project in part to independently determine whether the changes in terms and conditions of work for Unit 01 employees would adversely affect the productivity of repair and maintenance crews during school hours as had previously been assumed.

63. RICHARDSON informed MATSUURA and OKIMOTO of his plans regarding the whole school renovation pilot project. MATSUURA considered a policy altering hours of work to be a change in conditions of work. OKIMOTO instructed RICHARDSON "to involve the union" before implementing the changes. RICHARDSON, however, failed to notify the

Union of any of the changes before, during, or after the whole school renovation pilot project.

64. From February 2002 through October 2002 RICHARDSON unilaterally and without notification, consultation, or bargaining with the UPW (a) changed the start time from 9:30 a.m. to 8:00 a.m., (b) increased the work day from 8 hours to 9.5 hours, (c) modified the work week from 5 days a week to seven days a week, and (d) increased the work load of the employees in the repair and maintenance crews engaged in renovating public schools.

65. At the conclusion of the pilot project in July 2002 RICHARDSON determined that a change in the hours of work and work schedule would result in greater productivity in the repair and maintenance crews. On August 9, 2002 a letter proposing a change in work hours and work schedules was sent to the union. The Union responded with a request for information about the impact of the proposed changes. In his response to the Union RICHARDSON chose to conceal any reference to the pilot project and did not inform the Union of the unilateral changes which he had already implemented in the start time, the work day and the work week.

66. Absent notification of the aforementioned changes from RICHARDSON, MATSUURA or OKIMOTO, the Union did not actually know of the unilateral modifications in start time, work day, work week, and workload for bargaining unit 01 employees until after the prohibited practice complaint was filed on September 23, 2002. In fact, the disclosure of RICHARDSON's unilateral course of conduct was first discovered during RICHARDSON's testimony as a witness in these proceedings on and after November 18, 2002.

67. At no time prior to the filing of the complaint on September 23, 2002 did the Union know or should have known of the unilateral changes made by RICHARDSON from February 2002 through October 2002, which constituted a wilful violation of Sections 1.05 and 25.01 of the Unit 01 collective bargaining agreement (and thus a prohibited practice) by the Employer.

DISCUSSION

Second, Respondents assert that the claim regarding changes in start time, work day, work week, and workload made during and after the whole school pilot project are untimely because the pilot was initiated in February 2002 and the complaint was not filed until September 2, 2002, long after the 90-day statute of limitations expired. Hawaii Administrative Rules (HAR) § 12-42-42(a) identifies the limitations period applicable to the filing of prohibited practice complaints under HRS § 89-13. It provides as follows:

> A complaint that any public employer, public employee, or employee organization has engaged in any prohibited practice, pursuant to section 89-13, HRS, may be filed ... withing ninety days of the alleged violation.

See also HRS 377-9(l).

The statute of limitations for a prohibited (or unfair labor) practice complaint does not begin to run until the aggrieved party knew or should have known that his statutory rights were violated. David Santos v. State of Hawaii, Department of Transportation, 1 HPERB 669, 681 (1977) (90-day statute triggered when complainant was notified of the promotion of another employee); Alvis W. Fitzgerald v. George R. Ariyoshi, 3 HLRB 186, 198 (1983) (90-day statute of limitations was triggered on the effective date of the discharge, not the date the letter of discharge was received by complainant.) See also, Stone Board Yard v. HLRB, 75 F.2d 441, 445 (9th Cir. 1983); Peerless Roofing Co. v. NLRB, 641 F.2d 734, 736 (9th Cir. 1981); Metromedia, Inc., KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (9th Cir. 1978)

Where the nature of the prohibited (or unfair labor) practice pertains to a failure to bargain by the employer, the statute of limitations is not triggered until the employer provides notice to the union that it intends to implement unilateral action (and thus has no intention to negotiate the change). Hawaii Government Employees Association, Local 152, AFSCME, AFL-CIO v. Frank F. Fasi, 1 HPERB 641, 645-46 (1977). See also NLRB v. Walker Const. Co., 928 F.2d 695, 696 (5th Cir. 1991); Ruline Nursery Co. v. Agricultural Labor Relations Board, 169 Cal.App.3d 247, 265. The notice of the violation must be "clear and unequivocal." NLRB v. Public Service Electric & Gas Co., 157 F.3f 222, 227 (3d Cir. 1998).

No notice of the unilateral changes to the start time, work day, work week, and workload during and after the whole school renovation pilot project was ever provided to the union by the employer in the instant case. Since the UPW did not have actual (or constructive) knowledge of the violation of HRS § 89-13(a)(8) based on the Employer's wilful violations of Sections 1.05 and 25.01 of the Unit 01 collective bargaining agreement prior to the filing of the September 23, 2002 prohibited practice complaint, the claim is not time-barred.

CONCLUSION OF LAW

2. The Board has jurisdiction over a complaint for prohibited practices filed within 90 days of its "occurrence" under HRS § 377-9(l). A complaint is timely if it is filed within 90 days of an "alleged violation" of HRS § 89-13(a)(8) under HAR § 12-42-42(a). The statute of limitations is triggered when complainant knew or should have known of the

specific prohibited practice claim or claims in question. The claim the Employer violated HRS § 89-13(a)(8) by their wilful violation of Sections 1.05 and 25.01 of the Unit 01 agreement was not time-barred, because the UPW did not have actual or constructive knowledge of the unilateral changes RICHARDSON made to the start time, work day, work week, and workload during and after the whole school renovation pilot project prior to September 23, 2002 when the complaint was filed with the Board. All other prohibited practice claims as alleged in the September 23, 2002 complaint were timely as well.

ORDER

2. Respondents are ordered to negotiate other appropriate remedial and corrective relief to make the affected Unit 01 employees whole, including but not limited to back pay for employees resulting from the unilateral changes RICHARDSON made to the start time, work day, work week, and work load for the period from June 25, 2002 and thereafter due to the whole school renovation pilot project.[1] The failure to negotiate in good faith with the Union will be grounds for an award of attorney's fees and compensation for loss of overtime or other appropriate relief as determined by the Board.

DATED: Honolulu, Hawaii, June 30, 2006.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

KATHLEEN RACUYA-MARKRICH, Member

Copies sent to:

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Joyce Najita, IRC

[1]The Board here departs from the UPW's Proposed Findings of Fact, Conclusions of Law, and Order on Remand filed on August 9, 2004 to clarify the Board's remedial order to reflect that the Board intended that any remedy awarded would be calculated beginning 90 days preceding the filing of the instant complaint.